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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JARVIS JAY CORLEY, Defendant and Appellant.	B253017 (Los Angeles County Super. Ct. No. NA093528)

APPEAL from a judgment of the Superior Court of Los Angeles County, James B. Pierce, Judge. Affirmed.

Jenny Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals his conviction of one count of felony vandalism (Pen. Code, § 594, subd. (a).)[1] After defendant declined a plea agreement involving a sentence of two years, the matter went to trial and the jury found defendant guilty. The trial court sentenced defendant to a four-year term, consisting of the midterm of two years doubled pursuant to the "Three Strikes" law on account of defendant's prior strike. (§§ 1170.12, subd. (a)–(d), 667, subd. (b)–(i).) On appeal, defendant contends the trial court committed sentencing error by (1) impermissibly increasing his sentence for exercising his right to a jury trial; (2) violating the Equal Protection clause by sentencing him based on the status of his victim, and (3) abusing its discretion in refusing to strike his prior strike. We affirm.

BACKGROUND

An amended information filed November 14, 2013 charged defendant with one count of vandalism (§ 594, subd. (a).) The information also alleged that defendant had suffered one prior serious or violent felony (§§ 667.5, subd. (b)–(i), 1170.12, subds. (a)–(d) and one prior conviction for which a prison term was served (§ 667.5, subd. (b)).

1. Prosecution Case

Maria Gutierrez drove to the Department of Motor Vehicles (DMV) in Long Beach on August 31, 2012, about 3:00 p.m. She was with her daughter Wendy Maldonado, who was getting an identification card. Gutierrez drove a 2000 black Suburban. When Gutierrez arrived, she did not see any parking, so she dropped her daughter off. She drove around the lot, saw a space, and pulled into it. Gutierrez did not observe anyone else waiting for the space. As she opened her door to get out of the car, defendant came over to her and spoke to her. Defendant told her that she had taken his parking spot and called her a "stupid motherfucker." Although defendant spoke in English and Gutierrez does not speak English, she could understand many of the words he

[1] All further statutory references are to the Penal Code unless otherwise indicated.

used. Gutierrez closed the door of her car. Defendant drove off to look for a parking spot, and she saw that he was looking at her and pointing to his eyes.

Gutierrez went into the DMV told her daughter and a security guard at the DMV what had happened. Maldonado observed that her mother was anxious, nervous and scared. Maldonado called the police. Looking out of the DMV, Gutierrez saw defendant scratch her car with his keys. Afterwards, defendant walked into the DMV moving his keys up and down. After Gutierrez left the DMV, she saw scratches on her car that had not been there before. Gutierrez received an estimate of $1,300 to fix the car.

Alan Diaz, the security guard, witnessed the incident. He heard defendant and Gutierrez exchanging "heavy words," and Diaz saw defendant make an obscene gesture with his hand. Diaz saw defendant walking away from Gutierrez's car and when Diaz walked by the car, he observed that it was scratched "all the way around."

2. Defense Case

Shantell Garbutt is defendant's significant other and the mother of defendant's seven-month-old child. She works as a store manager for Staples. On August 31, 2012, she went to the DMV with defendant. The lot was full and they drove around for awhile until they found a vehicle leaving. After the vehicle pulled out—but before they could pull in—another car "zoomed into the spot." Defendant honked the horn because he could see that the car was going to take the space whey were waiting for. Defendant got out of their car and approached Gutierrez's vehicle. Garbutt could hear them talking. Defendant got back in the car with her, and Garbutt and defendant found another place to park.

Garbutt and defendant walked from the place where they parked toward the DMV offices. As they were walking towards the DMV, Garbutt's son ran off. This was the only time she was separated from defendant in the parking lot. When they got inside, they saw Gutierrez. Garbutt's daughter laughed at Gutierrez because Gutierrez was waiting in a long line. Several minutes later, a highway patrol officer walked up to defendant and asked to speak to him for a minute. After the officer escorted defendant

out of the DMV, she followed them. The officer handed her defendant's cell phone and keys.

3. Sentencing

The jury found defendant guilty on count 1. Defendant admitted his prior strike and prison term. The court denied probation and sentenced defendant to four years, consisting of the midterm of two years doubled pursuant to section 1170.2.

DISCUSSION

I. Exercise of Right to Jury Trial

Defendant contends the trial court penalized him for asserting his right to a jury trial because before trial, the court offered him half of his eventual sentence after trial. Respondent contends defendant waived the sentencing issue by failing to object at trial, and in any event, the trial court did not punish defendant for exercising his right to a jury trial because the sentence was based on information the court learned during trial, namely, the vulnerability of the victim.

A. Factual Background

Before trial, the court informed defendant that his maximum exposure was seven years. The court offered defendant 24 months, at half time; the court would strike defendant's prior strike and prior prison sentence. The prosecution had previously offered 32 months. Defendant countered with a six-year suspended sentence. The court explained the different offers to defendant:

"[A]s I told counsel in chambers, I'm trying to resolve this at an early disposition prior to litigation. And if I'm faced with the situation, which is completely different than if you were to enter a plea, of you going to court and telling this jury this did not happen and the jury not believing you or your witnesses, and the jury saying it did happen, it's a completely different situation than someone coming to you, you know, judge, I screwed up. It won't happen again. I've got to get on top of these anger management issues that I have. Believe me, it won't happen again. [¶] See, those are two different situations. And the mid term on this is two years plus the strike which is four plus the one-year prior.

That's not even high term. And that gets you to five years right there. [¶] So, again, I hope you thought about this all the way through, Mr. Corley, and I'll give you the fairest trial that I can. But you're going to put the court in a completely different position than what we are right now."

Defendant responded that he recognized the court's offer was a "good deal," but stated that he had a lot to lose. The court responded, "You have a lot to lose in all scenarios. Even under your scenario, you have a lot to lose." Defendant told the court he had a new baby and he was in the process of buying a house. Defendant submitted a letter of commendation, as well as documentation from his employer, the Department of Water and Power, which established that defendant had completed numerous skills courses at the department.

The court responded, "I was very impressed with that letter. That's why the court made the offer I did which is substantially below [the prosecution's]. I don't undercut the People every day of the week. And I do it rarely. I do it where I feel there's some justification for it. I do in this case because of that letter and other things that have been mentioned by both sides. But I took it all into consideration." The court commented on the prosecution's offer. "I have to look at the total package. And that's why the people are at 32 [months,] frankly. And that's not unreasonable to resolve this case. It's [the] low term, but its doubled because of that prior incident. And that prior incident is what's hanging this all up. That's what brought you here. That's what makes the DMV incident so significant. If that was your first incident, we wouldn't even be talking about any of these numbers. But it's not. You have to view that in view of your entire history to date. And that's what I'm trying to get at."

After trial and before sentencing, the court stated to defendant: "[Y]ou are to be congratulated . . . on making some tremendous strides. From where you were ten years ago, you've made tremendous strides. . . . Because this is the real danger in going to trial. I got to meet the victim in this case for the very first time. . . . And, frankly, neither side described this very well in their papers. That and both counsel have now seen the

victim . . . [¶] [Defense] counsel [states] that the victim was neither polite nor conciliatory. She was high-handed and rude. I don't think that describes it either. What we have here is a middle-aged victim, and I think that's putting it politely. I would have guessed her age to be higher than it actually is. But very diminutive, small, petite, if you will, female. . . . And once you approached that door and opened it up very aggressively, you should have realized what you were dealing with here. [¶] We're talking [about] a woman who can't even speak that much English. So as soon as you should have realized it wasn't some hot headed kid like yourself ten years ago that pulled into that parking spot taking it from you and saying, ha, ha, ha. It was a middle-aged woman who had just dropped off her daughter. And I mean, give me a break. She wasn't . . . high handed and laughing at you or whatever. [¶] Here you are. You start pointing your fingers at your eyes and pointing them to her, calling her stupid and ignorant and everything else. It was an act of a bully. You're still a bully. . . . [T]o do that to a middle-aged woman who you were standing over, both physically higher and wider. She was no threat to you at that point. Let her have the parking space. Give me a break. [¶] Is it that important, Sir, to give up the job, to give up for the children. You have children now. You can't think that through? . . . You got to start yelling and calling this woman every name in the book and say get out of here, that's my space? No. Come on, Mr. Corley. This is . . . the danger of going to trial. We now know who the victim is, and it's completely uncalled for."

The court stated that it would not sentence defendant to the maximum because it recognized the progress defendant had made, but the court observed that defendant had never apologized. The court imposed the strike based on defendant's recent history, observing "there hasn't been a complete period of time in which there's been no other violations."

B. Discussion

A defendant may not be penalized for exercising his or her jury trial right, which is a violation of the Fourteenth Amendment due process right. (*In re Lewallen* (1979) 23 Cal.3d 274, 278 (*Lewallen*); *People v. Collins* (2001) 26 Cal.4th 297, 306–307.) "'[A]

court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.'" (*People v. Clancey* (2013) 56 Cal.4th 562, 575.)

"There must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right [to a jury trial]." (*People v. Angus* (1980) 114 Cal.App.3d 973, 989–990.) In *Lewallen*, *supra*, 23 Cal.3d 274, the defendant refused to accept a negotiated sentence. Following a jury trial, at sentencing, the defense attorney requested informal rather than formal probation. (*Id*. at p. 276.) The trial court responded: "'I think I want to emphasize there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose. And as far as I'm concerned, if a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea.'" (*Id*. at p. 277.) The Supreme Court remanded the matter for resentencing, finding that the defendant had shown "that the trial court's exercise of its sentencing function was improperly influenced by his refusal of the proffered plea bargain and insistence on his right to trial." (*Ibid*.; see *In re Edy D*. (2004) 120 Cal.App.4th 1199, 1202 ["court's statement that if the minor inconvenienced witnesses by having them come to court for an adjudication hearing, the option of [an alternative probation] disposition . . . would no longer be available to him"]; *People v. Morales* (1967) 252 Cal.App.2d 537, 542, fn. 4 [trial court said prison inmate defendants "'have the same rights as anyone else . . . , but I don't think it's fair for an inmate, or anyone else, to come to Court and demand a jury trial, demand the services of the public defender . . . when there really isn't any defense to this case'"].)

However, "a trial court's discretion in imposing sentence is in no way limited by the terms of any negotiated pleas or sentences offered the defendant by the prosecution. The imposition of sentence within the legislatively prescribed limits is exclusively a

judicial function." (*Lewallen*, *supra*, 23 Cal.3d at p. 281.) "Legitimate facts may come to the court's attention either through the personal observations of the judge during trial [citation], or through the presentence report by the probation department, to induce the court to impose a sentence in excess of any recommended by the prosecution." (*Ibid*.) "[U]nder appropriate circumstances a defendant may receive a more severe sentence following trial than he would have received had he pleaded guilty; the trial itself may reveal more adverse information about him than was previously known." (*Ibid*.) "The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.)

Here, defendant points to the court's comments that it would be a "completely different situation" if defendant went to trial and defendant would be admitting he "screwed up" if he took a plea, and contends the statement establishes that in sentencing, the court would rely on the fact that the jury rejected defendant's defense. We disagree. The comments of the court evidence that it believed defendant should have taken the plea bargain the court offered, given defendant's criminal history and the nature of the offense: the court stated at sentencing that its decision to impose a harsher sentence was the result of its observations of the testimony of the victim, who was an elderly victim extremely frightened by the defendant's conduct; the court indicated the basis for its sentence at trial was defendant's prior criminal history and the nature of the current offense; and the court's belief that defendant had not completely eliminated his anger management problem because defendant (1) got out of his car and verbally abused the victim, (2) gestured at her with his fingers toward his eyes, and (3) methodically and deliberately keyed the victim's car after she had entered the DMV building. These facts establish that the court based its sentencing decision on the nature of offense, the victim's testimony, and defendant's prior criminal history, which are permissible bases for the court's decision.

II. Equal Protection

Defendant argues his sentence was based upon the victim's status in violation of the Equal Protection Clause.

"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, italics omitted.) "'[W]e apply different levels of scrutiny to different types of classifications. . . . [A] classification must be rationally related to a legitimate governmental purpose[, but] [c]lassifications based on race or national origin . . . and classifications affecting fundamental . . . rights are given the most exacting scrutiny.'" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) "A defendant, however, 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.'" (*Id* at p. 838.) Thus, "the rational basis test applies to equal protection challenges based on sentencing disparities. [Citations.]" (*People v. Ward* (2008) 167 Cal.App.4th 252, 258.)

Here, there is no equal protection violation based on gender. As the court stated, one basis of its sentencing choices were the permissible factors of the frailty and vulnerability of the victim, as evidenced not only by her age, size, and inability to speak English as well as defendant's aggressive conduct towards the victim and her vehicle.

III. Striking of Strike

Defendant argues the trial court abused its discretion in failing to strike his prior strike because the current offense was relatively minor and he has made significant strides toward rehabilitation, and there are no facts in the record to indicate his prior felony was particularly egregious. Respondent counters that defendant has a criminal history dating back to 1988, including as a juvenile, and here the trial court considered defendant's progress towards rehabilitation and did strike the one-year prior prison term enhancement.

A. Factual Background

Defendant filed a motion to strike his prior conviction for domestic violence. He argued his current history as an employed provider for his family who is currently enjoying commendations at his place of employment. He acknowledged that he had a past criminal history but asserted that the current offense did not involve any violence against the victim, and thus his crime did not rise to the level of seriousness or dangerousness to the community that usually accompanies "strikes" sentencing.

At the sentencing hearing, Michael Haydel testified that defendant had been part of a program initiated between the mayor's office and the Department of Water and Power as well as the local union. Defendant had been an exemplary employee, and was a leader who was elected president of his class. Defendant had been a hard worker and full of integrity. Haydel asked that defendant be able to continue his work at the Department of Water and Power and be a contributing member of society.

Defendant spoke on his own behalf and stated that he had been doing well at the Department of Water and Power and had a young baby he would like to see grow up and be able to take care of.

The prosecution stated that "we're all in agreement" that the case was not the "crime of the century." However, the prosecution noted that defendant's prior strike was related to defendant's anger issue. Further, defendant had an opportunity to step back from the situation in the parking lot but did not do so, instead confronted the victim and spoke to her in a harsh manner and damaged her car. Further, "based on [defendant's] record, he does fall within the confines of the three strikes system. His conviction is not that old. And, in fact, he was just discharged from the California Department of Corrections and Rehabilitation in 2013. . . . He's had parole revocation. . . . [¶] I understand that he is making efforts to take responsibility as an adult and member of society. . . . And I think [defendant] is still dealing with that anger management issue. And I think that some punishment is warranted to help him do that." The prosecution

noted that it asked for five years—the midterm doubled, plus one year for the prior offense.

Defense counsel pointed out that defendant had attempted to resolve the matter before the preliminary hearing and had brought a cashier's check for the damage to the victim's car, but because of the strike there was no disposition.

The court noted that it was a difficult case to resolve. If defendant did not have any priors, the court stated it would likely have imposed probation. But the court was required to look at defendant's entire history, which included numerous instances of past criminal conduct. The court refused to strike defendant's prior conviction, but agreed to strike the prior prison term allegation.

B. Discussion

Here, defendant argues the trial court abused its discretion in failing to strike his prior strike because his prior felony is unclear and undeveloped in the record because the information in the record is limited to the fact that defendant committed a domestic assault with great bodily injury in 2006, but does not reflect whether the offense was particularly egregious. Defendant also argues the current offense weighs in favor of striking the strike because the offense was not vicious or callous, did not cause thousands of dollars in damage, the victim was not present and there was no assault on the victim; further, defendant had demonstrated his progress in rehabilitating himself with employment and classes at the Department of Water and Power, his employer described him as a hard worker, and defendant has been providing for his family. Respondent counters that in 2001 defendant violated a three-year probation for a 1999 grand theft conviction, from 2000 to 2003 defendant had nine misdemeanor traffic violations, in 2005 defendant had a forgery conviction, and was given three years of probation. Defendant violated his probation with his conviction for domestic violence in 2006, and was sentenced to four years in prison in 2008.

In *People v. Superior Court* (1996) 13 Cal.4th 497 (*Romero*), the Supreme Court explained that, under section 1385, a trial court may strike or vacate an allegation or

finding under the Three Strikes law that a defendant has previously suffered a serious and/or violent felony conviction. (*Romero*, at p. 504.) The court's exercise of its discretion to dismiss strikes in the furtherance of justice "'"requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People. . . ."'" (*Id*. at p. 530, italics omitted.) In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court articulated the standard for striking prior convictions: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*Id*. at p. 161.) "[T]he [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Therefore, "[b]ecause the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside

the spirit of the [T]hree [S]trikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) The court should not dismiss or vacate a strike unless it concludes that the defendant may be deemed to be outside the anti-recidivist "spirit" of the Three Strikes law. (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.) A trial court's decision to deny a *Romero* motion is reviewed for abuse of discretion. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 374.)

Here, the trial court did not abuse its discretion in refusing to strike defendant's prior strike. The court reviewed defendant's lengthy prior criminal history, recognized that defendant had made significant progress in his life, but that on the other hand, defendant escalated the situation at the DMV with a vulnerable victim instead of walking away from it. As a result, we cannot say that defendant is not within the spirit of the Three Strikes law such that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.